UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW B. BURGOS, ADALBERTO AGUILAR, REUVEN FOGEL, and GABRIEL WALKER,

Plaintiffs,

vs.

UBER TECHNOLOGIES, INC., and PORTIER, LLC,

Defendants.

Civil Action No.: 16-cv-08512 (JPO)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL INDIVIDUAL ARBITRATION, DISMISS PLAINTIFFS' CLAIMS, OR IN THE ALTERNATIVE, STAY PROCEEDINGS UNTIL ARBITRATION IS COMPLETE, AND STRIKE PLAINTIFFS' CLASS AND COLLECTIVE ALLEGATIONS

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I. PRELIMINARY STATEMENT

Plaintiffs Matthew Burgos, Adalberto Aguilar, Reuven Fogel, and Gabriel Walker ("Plaintiffs") voluntarily entered into valid and enforceable arbitration agreements that require them to arbitrate, *inter alia*, disputes arising out of or related to their relationship with Defendants Uber Technologies, Inc. ("Uber") and Portier, LLC ("Portier") (collectively, "Defendants"), and to do so only on an individual basis.

In violation of this agreement, Plaintiffs filed a putative class and collective action lawsuit, alleging various claims under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"), as well as a common law breach of contract claim. Plaintiffs seek relief on behalf of themselves and certain other independent delivery partners who have used UberEATS and/or UberRUSH in New York.

Pursuant to the terms of their arbitration agreements, Plaintiffs cannot litigate their claims in this Court, and they cannot pursue classwide relief. Federal courts around the nation, including the U.S. Court of Appeals for the Ninth Circuit, have recently upheld and enforced similar arbitration agreements in cases brought against Uber. The same result is warranted here. Defendants therefore bring this motion for an order that: (i) compels Plaintiffs to submit their claims to individual arbitration in compliance with their agreements, (ii) dismisses their claims, or in the alternative, stays proceedings until arbitration is complete, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3, 4, and (iii) strikes their class and collective allegations.

II. RELEVANT FACTS

A. The Uber Partner App connects independent delivery partners with users and merchants.

Uber is a technology company that offers smartphone applications that, among other things, enable users and merchants to arrange for the delivery of goods by independent delivery partners through UberRUSH and UberEATS (the "Uber Apps"). (Declaration of Michael Colman in Support of Defendants' Motion to Compel Individual Arbitration, Dismiss Plaintiffs' Claims, or in the Alternative, Stay Proceedings Until Arbitration is Complete, and Strike Plaintiffs' Class and Collective Allegations ["Colman Decl."], ¶ 3.) Uber provides the technology through its smartphone applications, which allow users, merchants, and delivery partners to connect based on their location and delivery needs. (*Id.*) Uber offers the applications as a tool to users, merchants, and delivery partners to facilitate delivery services. (*Id.*) The Uber Apps are available in over 175 cities across the country for the purpose of facilitating the transportation of people and/or goods. (*Id.* at ¶ 5.)

Portier is a wholly-owned subsidiary of Uber Technologies, Inc. engaged in the business of providing delivery lead generation services to independent delivery partners using UberRUSH and UberEATS. (Colman Decl., ¶ 4.) Any delivery partner who wishes to access UberRUSH and UberEATS in New York must first enter into an agreement with Portier. (*Id.*)

B. Plaintiffs agreed to arbitrate claims arising out of, or relating to, their agreement with Defendants.

Delivery partners cannot access UberEATS or UberRUSH to generate leads for deliveries unless and until they electronically accept the operative agreement to use the Uber App for driver partners and delivery partners (the "Partner App"). (Colman Decl., ¶ 7.) In order to enter into the operative agreement and gain access to the platform, delivery partners must first log in to the Partner App using a unique username (the delivery partner's email address) and password selected by the delivery partner to create an Uber account. (*Id.*) The delivery partner personally selects the unique username and password at the time he/she signs up to use the Partner App, and the partner's account can only be accessed by inputting that unique username and password. (*Id.*)

When a new delivery partner logs on to the Partner App after completing the sign-up process, he/she is given the opportunity to review the operative agreement by clicking a hyperlink presented on the screen within the Partner App. (Colman Decl., ¶ 8.) At the top of this screen, the Uber Partner App states the following: "Please review and agree to the documents below." (*Id.*, Exh. A.) For the August 2016 Technology Services Agreement that Plaintiffs accepted (the "August 2016 Agreement"), the hyperlink was entitled "PORTIER Services Agreement August 31 2016." (*Id.*) Clicking the link opens the August 2016 Agreement, which can be reviewed beginning to end on the screen by scrolling through. (*Id.*) Delivery partners are free to spend as much time as they wish reviewing the Agreement on their smartphones. (*Id.*)

To advance past the screen that contains the link to the document, the delivery partner has to click "YES, I AGREE" to the August 2016 Agreement. (Colman Decl., ¶ 9.) Directly above "YES I AGREE," the Partner App states the following: "By clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." (*Id.*, Exh. A.) After clicking "YES, I AGREE," he/she is prompted to confirm acceptance a second time. On the second screen, the Partner App states the following: "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." (*Id.*, Exh. B.) After clicking "YES, I AGREE" a second time, delivery partners are able to access the Partner App, and the agreement is automatically and immediately sent to their Driver Portal, where they can access the agreement to review at their leisure any time, either online or by printing a copy. (*Id.*, ¶ 10.)

Portier periodically revises its agreements, and delivery partners who have previously entered into an agreement may be asked to assent to revised versions of the contract in order to receive continued access to the Partner App. (Colman Decl., ¶ 11.) Each time a revised agreement is rolled out, the process described above is repeated. (*Id.*) That is, no delivery partner is bound to the new agreement until he or she affirmatively accepts. (*Id.*)

Plaintiff Burgos signed up to use UberRUSH and/or UberEATS on or about November 9, 2015. (Colman Decl., ¶ 13.) Plaintiff's account was activated on December 10, 2015. (*Id.*) Plaintiff Burgos accepted the August 2015 Services Agreement (the "August 2015 Agreement") and the February 2016 Technology Services Agreement (the "February 2016 Agreement") on December 10, 2015 and February 14, 2016, respectively. (*Id.*) Plaintiff Burgos accepted the operative August 2016 Agreement through Partner App using the process described above on September 3, 2016. (*Id.*, Exh. G.)

Plaintiff Aguilar signed up to use UberRUSH and/or UberEATS on or about March 5, 2016. (Colman Decl., ¶ 14.) Plaintiff's account was activated on March 10, 2016. (*Id.*) Plaintiff Aguilar accepted the February 2016 Agreement on March 10, 2016. Plaintiff Aguilar accepted the operative August 2016 Agreement through the Partner App using the process described above on September 6, 2016. (*Id.*, Exh. H.)

Plaintiff Fogel signed up to use UberRUSH and/or UberEATS on or about February 18, 2016. (Colman Decl., ¶ 15.) Plaintiff's account was activated on March 10, 2016. (*Id.*) Plaintiff Fogel accepted the February 2016 Agreement on March 10, 2016. Plaintiff Fogel accepted the operative August 2016 Agreement through the Partner App using the process described above on September 1, 2016. (*Id.*, Exh. I.)

Plaintiff Walker signed up to use UberRUSH and/or UberEATS on or about January 7, 2015. (Colman Decl., ¶ 16.) Plaintiff's account was activated that same day. Plaintiff Walker accepted the May 2014 Software License and Online Services Agreement the "May 2014

Agreement"), the August 2015 Agreement, and the February 2016 Agreement on January 7, 2015, September 23, 2015, February 14, 2016, respectively. (*Id.*) Plaintiff Walker accepted the operative August 2016 Agreement through the Partner App using the process described above on September 1, 2016. (*Id.*, Exh. J.)

An arbitration provision was contained in each of the pre-August 2016 Agreements accepted by Plaintiffs. (Colman Decl., Exhs. C-E.) The operative August 2016 Agreement, which Plaintiffs accepted electronically through the App, also contains an arbitration agreement (the "Arbitration Provision"), which broadly requires delivery partners, ***if they do not opt out***, to individually arbitrate ***all*** disputes arising out of or related to the agreement or their relationship with Uber. (*Id.*, Exh. F.) Plaintiffs did not opt out.[1] (*Id.*, ¶ 19.)

The Arbitration Provision in the August 2016 Agreement provides, in relevant part, as follows:

> This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA"). Except as it otherwise provides, this Arbitration Provision applies to any dispute, past, present or future, arising

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[1] On October 4, 2016, Plaintiff Burgos submitted a statement purporting to opt out of the Arbitration Provision. (Colman Decl., ¶ 20, Exh. K.) However, Plaintiff's request was untimely, since it was submitted on October 4, 2016, *31* days after he accepted the Agreement. (*Id.*) On January 5, 2017, Plaintiff Burgos' account was deactivated due to fraudulent activity on the App. (*Id.*) Plaintiff attempted to regain access to the platform later that day by "accepting" the August 2016 Agreement a second time after it was inadvertently made available to him through the App. However, Plaintiff's account was never reactivated by Uber. (*Id.*) Thus, although Plaintiff accepted the August 2016 Agreement a second time, he could not have used UberRUSH or UberEATS, and has not done so since his account was deactivated. (*Id.*) Nevertheless, after reaccepting the August 2016 Agreement, Plaintiff submitted another statement purporting to opt out of the Arbitration Provision. (*Id.*, Exh. L.) Because Plaintiff's account was never reactivated, however, this opt out statement was also invalid. (*Id.*) In addition, the Arbitration Provision provides that "**if Company modifies any provision of this Agreement other than a provision in Section 15.3, you will not have a renewed opportunity to opt out of arbitration.**" (*Id.*, Exh. F, at § 15.3(viii); bold in the original.) Accordingly, because Plaintiff merely reaccepted the *same* Agreement, with the *same* Arbitration Provision, he did not have a renewed opportunity to opt out.

out of or related to this Agreement or formation or termination of the Agreement and survives after the Agreement terminates.…

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration, with the exception of proceedings that must be exhausted under applicable law before pursuing a claim in a court of law or in any forum other than arbitration. Except as it otherwise provides, this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.

Except as provided in Section 15.3(v), below, regarding the Class Action Waiver and PAGA Waiver, such disputes include disputes arising out of or relating to interpretation, application, enforceability, revocability or validity of this Arbitration Provision, or any portion of the Arbitration Provision. This also includes disputes regarding whether the Arbitration Provision is governed by the FAA. All such matters shall be decided by an Arbitrator and not by a court or judge…

Except as it otherwise provides, this Arbitration Provision also applies to all disputes between you and the Company or Uber, as well as all disputes between you and the Company's or Uber's fiduciaries, administrators, affiliates, subsidiaries, parents, and all successors and assigns of any of them, including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company or Uber, including the formation or termination of the relationship. Except as it otherwise provides, this Arbitration Provision also applies to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, harassment, retaliation, discrimination, and claims arising under the … Fair Labor Standards Act … and state statutes, if any, addressing the same or similar subject matters, and all other similar federal, state and/or local statutory and common law claims.

(*Id.*, Exh. F at § 15.3(i); bold in the original.)[2]

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[2] Uber Technologies, Inc. is expressly listed as an intended third-party beneficiary of the Agreement and the Arbitration Provision. In addition, as set forth in the Agreement, as used in the Arbitration Provision, the term "Company" "shall be deemed to include Uber Technologies, Inc." (Colman Decl., Exh. F, § 15.3(i).)

The Arbitration Provision further provides that Plaintiffs must pursue any claims in arbitration "**on an individual basis only, and not on a class, collective action, or representative basis.**" The Arbitration Provision continues, "**[t]he Arbitrator shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or representative basis.**" (Colman Decl., Exh. F, § 15.3(v); bold in the original.)

Plaintiffs voluntarily entered into the August 2016 Agreement. While hundreds of delivery partners have opted out of the Arbitration Provision contained in the August 2016 Agreement, Plaintiffs did not opt out. (Colman Decl., ¶¶ 19-20.) Plaintiffs were given 30 days and multiple ways to opt out, including by simply sending an email to optout@uber.com. Plaintiffs were also notified of their right to consult with an attorney regarding the Provision:

> **Your Right To Opt Out Of Arbitration.**
>
> **Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision…**
>
> **Should you not opt out of this Arbitration Provision within the 30-day period, you and the Company shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of your choice concerning this Arbitration Provision. You understand that you will not be subject to retaliation if you exercise your right to assert claims or opt-out of coverage under this Arbitration Provision.**

(*Id.*, Exh. F at § 15.3(viii); bold in the original.)

The August 2016 Agreement also contains extensive cautionary notices, both at the beginning of the agreement and immediately before the Arbitration Provision, that advised Plaintiffs of the ramifications of agreeing to arbitration and of choosing not to opt out, as well as of certain pending litigation against Uber. The following notice appears on the first page of the August 2016 Agreement:

> **IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES AND THE ASSOCIATED SOFTWARE, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW IN SECTION 15.3 CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS, EXCEPT AS OTHERWISE PROVIDED IN SECTION 15.3, THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION. BY VIRTUE OF YOUR EXECUTION OF THIS AGREEMENT, YOU WILL BE ACKNOWLEDGING THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS OF THIS AGREEMENT (INCLUDING THE ARBITRATION PROVISION IN SECTION 15.3) AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT BUSINESS DECISION. IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN SECTION 15.3 BELOW.**

(Colman Decl., Exh. F; bold in the original.)

In addition, the following language appears immediately prior to the Arbitration Provision in the August 2016 Agreement:

> IMPORTANT: Except as otherwise provided below, this Arbitration Provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis. Except as otherwise provided below, this provision will also preclude you from initiating, participating in, or recovering any relief in a class, collective, or representative action against the Company, Uber, or Uber's Affiliates…
>
> If you do not wish to be subject to this Arbitration Provision, you may opt out of the Arbitration Provision by following the instructions provided in Section 15.3(viii)…
>
> **WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. IT IS YOUR DECISION TO MAKE, AND YOU SHOULD NOT RELY SOLELY UPON THE INFORMATION PROVIDED IN THIS AGREEMENT AS IT IS NOT INTENDED TO**

> **CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ARBITRATION. YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS — INCLUDING BUT NOT LIMITED TO AN ATTORNEY — REGARDING THE CONSEQUENCES OF YOUR DECISION, JUST AS YOU WOULD WHEN MAKING ANY OTHER IMPORTANT BUSINESS OR LIFE DECISION.**

(Colman Decl., Exh. F at § 15.3; bold and capitalization in the original.)

Plaintiffs accepted the August 2016 Agreement, and they did not opt out of the Arbitration Provision, despite having the unfettered right to do so. (Colman Decl., ¶¶ 19-20.) Accordingly, Plaintiffs are contractually bound to individually arbitrate their claims against Defendants.

C. Plaintiffs filed a lawsuit asserting claims arising out of, or related to, the August 2016 Agreement.

Ignoring their obligation to individually arbitrate this dispute, Plaintiffs filed this putative class and collective action against Defendants. Plaintiffs' Second Amended Complaint alleges the following causes of action: (i) minimum wage and overtime violations under the FLSA, (ii) minimum wage, spread-of-hour, and overtime violations under the NYLL, (iii) unlawful retention of gratuities under the NYLL, (iv) notice and wage statement violations under the NYLL, (v) unlawful "kickbacks" under the FLSA and NYLL, (vi) retaliation under the FLSA and NYLL, and (vi) breach of contract. (SAC, ¶¶ 303-397.)

III. THE COURT SHOULD ORDER PLAINTIFFS TO ARBITRATE THEIR CLAIMS ON AN INDIVIDUAL BASIS PURSUANT TO THE FAA.

The Court should order Plaintiffs to arbitrate their claims against Defendants on an individual basis and dismiss their claims, or in the alternative, stay proceedings until arbitration is complete, pursuant to the FAA, 9 U.S.C. §§ 3, 4. Plaintiffs entered into a valid and enforceable arbitration agreement governed by the FAA, expressly waiving their right to pursue such claims in court and on a classwide basis.

A. The Federal Arbitration Act applies to the Arbitration Provision.

As affirmed by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) ("*Concepcion*"), the FAA declares a liberal policy favoring the enforcement of arbitration agreements, stating: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In enacting the FAA, Congress sought to overcome what was then widespread judicial hostility to the enforcement of arbitration agreements. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (explaining that the FAA was enacted "[t]o overcome judicial resistance to arbitration").

The FAA permits private parties to "trade[] the procedures … of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). It is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). To these ends, the FAA not only places arbitration agreements on equal footing with other contracts, but amounts to a "congressional declaration of a liberal federal policy ***favoring*** arbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone*, 460 U.S. at 24) (emphasis added); *Concepcion*, 131 S. Ct. at 1745 ("The overarching purpose of the FAA … is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *Direct TV, Inc. v. Imburgia*, __ U.S. __, 136 S. Ct. 463, 468 (2015) ("The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act").

The Arbitration Provision at issue here is indisputably governed by the FAA. First, the Arbitration Provision says as much, which is sufficient to bring it within the purview of the FAA. *See Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63-64 (1995) (FAA applies even where contract also provides that state law governs); *Imburgia*, 136 S. Ct. at 468-71 (FAA applies even if agreement designates a state choice of law).

Second, the agreement containing the Arbitration Provision affects commerce. The FAA's term "involving commerce" is interpreted broadly. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (finding the requisite commerce for FAA coverage even when the individual transaction did not have a substantial effect on commerce). The Uber Apps are available in over 175 cities across the U.S. Plaintiffs' use of the Partner App therefore involved commerce sufficient for the FAA to apply.[3]

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[3] Even if the FAA did not apply, Plaintiffs' claims would still be subject to individual arbitration under New York law, which likewise favors arbitration. *See Bd. of Educ. of Bloomfield Cent. Sch. Dist. v. Christa Constr., Inc.*, 80 N.Y.2d 1031, 1032 (1992) ("This Court has repeatedly held that arbitration is a favored method of dispute resolution in New York, and 'New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration.'" (internal citations omitted)); *League of Am. Theatres & Producers, Inc., v. Cohen*, 270 A.D.2d 43 (1st Dep't 2000) (affirming grant of motion to compel because "arbitration should not be stayed unless the arbitration clause cannot be reasonably interpreted to cover the disputed matter"). Under New York law, courts tasked with determining whether to order arbitration address the following questions: (1) "whether parties have agreed to submit their disputes to arbitration," and (2) "if so, whether the disputes generally come within the scope of their arbitration agreement." *Sisters of St. John the Baptist, Providence Rest Convent v. Geraghty Constructor, Inc.*, 67 N.Y.2d 997, 998 (1986). "The court's inquiry ends . . . where the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate." *Id.* at 998. At that point, the action is exclusively within the province of the arbitrator. *See also*, NY CPLR §§ 7501; 7503(a).

B. The Arbitration Provision is valid and must be enforced under the FAA.

The FAA requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement, consistent with the principle that arbitration is a matter of contract. 9 U.S.C. § 4. In determining whether to compel arbitration under the FAA, two "gateway" issues need to be evaluated: (i) whether there is a valid agreement to arbitrate between the parties; and (ii) whether the agreement covers the dispute. *PacifiCare Health Sys. v. Book*, 538 U.S. 401, 407 n.2 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002); *Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996). Both gateway issues are satisfied here. However, this Court need not even reach them, because the Arbitration Provision expressly provides that its validity and enforceability should be determined by an arbitrator.

1. The Arbitration Provision delegates the gateway issues to the arbitrator.

Before reaching the two gateway issues, a court must examine the underlying contract to determine whether the parties have agreed to commit the threshold question of arbitrability to the arbitrator. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional antecedent agreement the party seeking arbitration asks the court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."); *Buckeye Check Cashing*, 546 U.S. at 446 ("the issue of the contract's validity is considered by the arbitrator in the first instance"). Accordingly, under *Rent-A-Center*, where the parties have clearly and unmistakably agreed, as they have here, the Court must send the issue of arbitrability to the arbitrator. *See, e.g., Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 423 (E.D.N.Y. 2014) ("When the parties empower the arbitrator to decide 'arbitrability,' the Court's role is narrowed from deciding whether there is an applicable arbitration agreement to only deciding whether there is a valid delegation clause."); *Neal v. Asta Funding, Inc.*, No. 13-3438, 2013 U.S. Dist. LEXIS 170801, at *17-18 (D.N.J. Dec. 4, 2013) (where an arbitration agreement requires disputes concerning its validity to be decided by the arbitrator, "[q]uestions of arbitrability are committed in the first instance to the Arbitrator").

Here, the Arbitration Provision's Delegation Clause expressly provides that "disputes arising out of or relating to interpretation, application, enforceability, revocability or validity of this Arbitration Provision, or any portion of the Arbitration Provision … shall be decided by an Arbitrator and not by a court or judge."[4] Therefore, any question as to the validity of the Arbitration Provision and whether it applies to this dispute has been delegated to, and must be decided by, the arbitrator.

Federal courts around the nation, including the U.S. Court of AAppeals for the Ninth Circuit, have all recently reached this same conclusion when evaluating a similar arbitration provision in cases brought against Uber. In each case, the court enforced the arbitration provisions, and granted Uber's motions to compel individual arbitration. *See Sena v. Uber Techs., Inc.*, No. CV-15-02418-PHX-DLR, 2016 U.S. Dist. LEXIS 47141, at *22 (D. Ariz. Apr. 7, 2016) ("The Court must compel Sena to submit to arbitration because the parties entered into a valid and enforceable agreement to arbitrate questions of arbitrability."); *Varon v. Uber Techs., Inc.*, No. Case 1:15-cv-03650-MJG, 2016 U.S. Dist. LEXIS 58421, at *15 (D. Md. May 3, 2016) ("the Court finds that [the] delegation clause is a valid and enforceable agreement that was clearly and unmistakably communicated and is neither procedurally nor substantively unconscionable."); *Suarez v. Uber Techs., Inc.*, No. 8:16-cv-00166-JSM-MAP, 2016 U.S. Dist.

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[4] The Arbitration Provision, however, does expressly leave for the Court to rule on the enforceability of the Class Action Waiver. Accordingly, Defendants request that the Court find the Class Action Waiver enforceable and delegate all other disputes regarding enforceability and validity of the Arbitration Provision to the arbitrator.

LEXIS 59241, at *14 (M.D. Fla. May 4, 2016) ("The parties entered into valid and enforceable agreements to arbitrate questions of arbitrability."); *Bruster v. Uber Techs. Inc.*, No. 15-CV-2653 (JG), 2016 U.S. Dist. LEXIS 67523, at *14 (N.D. Ohio May 23, 2016); *see also id.*, No. 15-CV-2653 (JG) (N.D. Ohio Aug. 2, 2016) (denying reconsideration); *Lee v. Uber Techs., Inc.*, Case No. 15-cv-11756, 2016 U.S. Dist. LEXIS 140171, at *13 (N.D. Ill. Sept. 21, 2016); *Micheletti v. Uber Techs., Inc.*, Case No. 15-1001-RCL, 2016 U.S. Dist. LEXIS 137318, at *11 (W.D. Tex. Oct. 3, 2016); *Zawada v. Uber Techs., Inc.*, No. 2:16-cv-11334-LJM-SDD, 2016 U.S. Dist. LEXIS 178582, at *15 (E.D. Mi. Dec. 27, 2016); *Richemond v. Uber Techs., Inc.*, No. 16-cv-23267, 2017 U.S. Dist. LEXIS 12355, at *9 (S.D. Fla. January 27, 2017); *Singh v. Uber Techs., Inc.*, No. 16-cv-03044, 2017 U.S. Dist. LEXIS 12033, at *36 (D.N.J. Jan. 30, 2017); *Gunn v. Uber Techs., Inc.*, No. 1:16-cv-01668-SEB-MJD, 2017 U.S. Dist. LEXIS 11393, at *7 (Magistrate Judge Dinsmore) (S.D. Ind. Jan. 27, 2017); *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, *1109 (9th Cir. 2016); *see also Congdon v. Uber Techs., Inc.*, Case No. 16-cv-02499-YGR, 2016 U.S. Dist. LEXIS 170138, at *9-10 (N.D. Cal. Dec. 8, 2016); *Scroggins v. Uber Techs., Inc.*, No. 1:16-cv-01419-SEB-MJD, 2017 U.S. Dist. LEXIS 10815, at *8 (Magistrate Judge Dinsmore) (S.D. Ind. Jan. 26, 2017).

2. The gateway issues under the FAA have been satisfied.

If this Court disagrees and finds that it, rather than the arbitrator, should evaluate the enforceability and interpretation of the Arbitration Provision, both "gateway" issues have been satisfied here.

a. A valid agreement to arbitrate exists.

General contract law principles apply to the interpretation and enforcement of arbitration agreements. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Plaintiffs' claims must be referred to arbitration because the Arbitration Provision is a binding agreement under state law principles of contract formation. *Brown v. St. Paul Travelers Cos.*, 559 F. Supp. 2d 288, 291 (W.D.N.Y. 2008) ("courts employ 'ordinary principles of contract and agency' in order to determine whether the parties have agreed to arbitrate") (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776-77 (2d Cir. 1995)).

Plaintiffs (i) twice affirmatively acknowledged their intent, after ample opportunity to review, to be bound by the terms of the August 2016 Agreement, including the conspicuous Arbitration Provision contained therein; and (ii) had 30 days after accepting to review the Arbitration Provision and consider whether to opt out, but did not do so.[5] Accordingly, Plaintiffs' acceptance was clear and unequivocal, and a valid agreement to arbitrate exists.

b. Plaintiffs' claims as to all Defendants fall within the scope of the Agreement.

The FAA requires courts to apply a presumption *favoring* arbitration. *See Moses H. Cone*, 460 U.S. at 24-25. In fact, courts must enforce arbitration agreements "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

This case does not present a close call. Plaintiffs specifically agreed to arbitrate "disputes arising out of or related to this Agreement and disputes arising out of or related to [their] relationship with the Company or Uber, including the formation or termination of the relationship," and "disputes regarding any city, county, state or federal wage-hour law … compensation, breaks and rest periods, expense reimbursement, termination … retaliation… and

[5] *See Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1075-77 (9th Cir. 2014) (individual who is provided the opportunity to opt out of an arbitration agreement is "free not to arbitrate," and, in declining that opportunity, the employee makes the choice to arbitrate his or her potential claims); *Michalski v. Circuit City Stores, Inc.,* 177 F.3d 634, 636 (7th Cir. 1999) (distinguishing mandatory arbitration agreement from one in which individual is free to opt out).

all other similar federal, state and/or local statutory and common law claims." (Colman Decl., Exh. F at § 15.3(i).) The phrase "arising out of or relating to" an underlying agreement is frequently deemed to be the broadest sort of all-encompassing language available. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 7 (1984); *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F. 3d 16, 20 (2d Cir. 1995).

Given these considerations, and the strong presumption in favor of arbitration, all of Plaintiffs' claims against Defendants fall squarely within the scope of the agreement to arbitrate. Accordingly, the "gateway" issues under the FAA are met, and Plaintiffs should be ordered to arbitrate.

C. Plaintiffs' class and collective claims cannot proceed.

The Court should also order the parties to arbitrate Plaintiffs' claims solely on an individual basis. "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center West*, 561 U.S. at 67. Section 4 of the FAA provides that a party may obtain an order compelling arbitration "in the manner provided for in [the parties'] agreement." 9 U.S.C. § 4.

Similarly, section 3 of the FAA authorizes federal courts to stay litigation until the arbitration has been conducted "in accordance with the terms of the [parties' arbitration] agreement…[.]" 9 U.S.C. § 3. The "primary purpose" of the FAA is "ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences v. Bd. of Trustees*, 489 U.S. 468, 479 (1989); *see Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 53-54 (1995) (enforcement of arbitration agreements "according to their terms" is the "central purpose" of the FAA); *see Concepcion*, 131 S. Ct. at 1748 (same).

The Supreme Court has made abundantly clear that parties to an arbitration agreement are free to set the terms of their agreement. *Volt*, 489 U.S. at 479 (parties may "specify by contract the rules under which that arbitration will be conducted"). Taking its lead from the Supreme Court, the Seventh Circuit Court of Appeals has described that leeway in the following rather raw terms: "Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes." *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 709 (7th Cir. 1994).

The kinds of terms that parties are free to agree upon, or not, include a provision precluding class and collective adjudication. As the Supreme Court confirmed in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, it is improper to force a party into a class proceeding to which is did not agree, because arbitration "is a matter of consent." 559 U.S. 662, 664 (2010). Parties "may specify with whom they choose to arbitrate their disputes." *Id.* at 683 (emphasis in original). As such, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684.

Here, the parties did not agree to class arbitration. Instead, they expressly prohibited class claims: "**You and the Company agree to resolve any dispute that is in arbitration on an individual basis only, and not on a class, collective action, or representative basis ("Class Action Waiver").**" The Arbitration Provision further provides that "**this Arbitration Provision requires all [covered] disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.**" (Colman Decl., Exh. F at § 15.3(i), (v); bold in original.)

In *Concepcion,* the Supreme Court upheld the enforceability of class waivers in FAA-governed arbitration agreements, reaffirming the bedrock principle that arbitration agreements must be enforced as written. The Court held that the California Supreme Court's rule restricting enforcement of class action waivers was preempted by the FAA, because it interfered with the fundamental attributes of arbitration and created a scheme inconsistent with the FAA. *See* 131 S. Ct. at 1753.[6]

In *American Express Co. v. Italian Colors Restaurant*, an appeal from a decision of the Second Circuit, the Supreme Court reiterated that courts "must rigorously enforce" arbitration agreements according to their terms, including terms that "specify with whom [the parties] choose to arbitrate their disputes." 133 S. Ct. 2304, 2309 (2013). The Court reversed the Second Circuit and enforced a class action waiver in an arbitration agreement, ruling that such a waiver in a FAA-governed arbitration agreement is enforceable, even if the plaintiff's costs of individually arbitrating a claim exceed the potential individual recovery. *Id.* at 2311-12.

Courts faced with arbitration agreements containing express class action waivers consistently uphold their enforceability and compel arbitration on an individual basis. *See, e.g., Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (upholding class action waiver and reversing district court's decision to deny motion to compel arbitration of plaintiffs' FLSA and NYLL overtime claims); *Patterson v. Raymours Furniture Co.*, Case No. 15-2820-cv, 2016 U.S. App. LEXIS 16240 (2d Cir. Sep. 2, 2016) (Summary Order); *Torres v. United Healthcare Servs*., 920 F. Supp. 2d 368 (E.D.N.Y. 2013) (compelling arbitration of plaintiff's collective FLSA claims on an individual basis); *Ryan v. JPMorgan Chase & Co.*, 2013 U.S. Dist. LEXIS 24628, at *9-10 (S.D.N.Y. Feb. 21, 2013) (enforcing class arbitration waiver in FLSA case, and granting defendant's motion to dismiss and compel arbitration of plaintiff's claim on an individual basis).

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[6] The Supreme Court also explained that class arbitration was inconsistent with the fundamental attributes of arbitration as contemplated by the FAA. *Concepcion*, 131 S. Ct. at 1750-51. In particular, the Court stated that class arbitration sacrificed the principal advantage of arbitration – its informality – and rendered the process slower and more costly. *Id.* at 1751-52. The Court further noted it was unlikely Congress intended to have an arbitrator address the more formal procedural requirements of a class proceeding. *Id.* Finally, the Court opined that arbitration was poorly suited to the higher stakes of class litigation and significantly increased the risks to defendants, especially given the absence of multilayered judicial review. *Id.* at 1752. Accordingly, because the Supreme Court concluded that California's *Discover Bank* rule effectively forced parties into class arbitration as a condition of enforcement of their arbitration agreement, and because class arbitration interfered with the fundamental attributes of arbitration, including the paramount principle that arbitration agreements are to be enforced as written, the Court held that the *Discover Bank* rule was inconsistent with the FAA and thus preempted. *Id.* at 1754. *Concepcion* was later reaffirmed by the Supreme Court in *Imburgia*. 136 S. Ct. at 468 ("The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act").

Accordingly, the Arbitration Provision should be enforced as written, Plaintiffs' individual claims should be sent to arbitration, their class and collective allegations should be stricken, and the case should be dismissed, or in the alternative, stayed, until arbitration is complete. *See, e.g.*, *Torres*, 920 F. Supp. 2d at 379 ("defendants' motion to compel arbitration is granted and the case is dismissed"); *Litvinov v. UnitedHealth Group, Inc.,* 2014 U.S. Dist. LEXIS 36237, at *12 (S.D.N.Y. Mar. 11, 2014) (compelling arbitration and dismissing the complaint).

IV. CONCLUSION

Because the parties entered into a valid contract requiring the submission of any disputes arising out of Plaintiffs' relationship with Defendants to be decided in arbitration on an individual basis, and this dispute falls within the scope of that agreement, this Court should order Plaintiffs to individually arbitrate their claims against Defendants, dismiss Plaintiffs' claims, and strike Plaintiffs' class and collective allegations.

Respectfully submitted,

Date: January 31, 2017
New York, New York

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